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Agins v. City of Tiburon: Open Space Zoning Prevails - Failure to Submit Master Plan Prevents a Cognizable Decrease in Property Value

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Agins v. City of Tiburon: Open Space Zoning Prevails—Failure to Submit Master Plan Prevents a Cognizable Decrease in Property Value

This casenote examines the Supreme Court's struggle to reconcile its focus on the facial validity of a zoning ordinance with the traditional "taking" approach requiring diligent factual inquiry. While the Agins Court reiterates such an approach, the author notes the Court's departure from important constitutional and precedential considerations. The author offers a possible explanation for the departure, concluding that the Agins decision apparently makes plan submission a prerequisite for acknowledging economic loss and strongly implies a requirement of complete loss of all property value before a compensable taking will be recognized.

Apart from its people, a country's single greatest resource is the land within its boundaries. It is on this land that the people must live and from its bounty that they must survive. There is little doubt that so valuable and vital a resource must be regulated to some degree in order to promote the good of all concerned. However, a problem arises where the land to be regulated is privately owned by citizens whose rights in such property are protected by the United States Constitution. The difficulty is deciding where regulation ends and confiscation, requiring government compensation, begins. Believing that the United States Constitution holds the answer, landowners continue to claim the protection of constitutional guaranties, while the courts struggle to interpret those guaranties.

The regulation contested in *Agins v. City of Tiburon*[1] was an open space zoning ordinance, which rezoned appellants' property calling for a density of not more than one home per acre. In determining whether or not the ordinance represented a taking of private property for public use without just compensation, the United States Supreme Court held that there was no taking and that the ordinance was therefore constitutional on its face.[2]

To criticize the Court because it found no taking in *Agins* is not the purpose of this analysis. For any negative comment found herein could also be offered had the Court decided that there was a taking. This note will examine the constitutional, factual, and

1. 100 S. Ct. 2138 (1980).
2. 100 S. Ct. at 2141.

precedential backdrops against which *Agins* was decided, evaluating the Court's methods and decision in light of these considerations.

I. THE CONSTITUTIONAL SETTING

Zoning regulations perform an important and necessary function in a modern society. Given the complexity of everchanging conditions and priorities within such a society, those responsible for the formation and enforcement of zoning regulations must be afforded some degree of flexibility so that they may adequately meet their responsibilities. They must, however, stay within constitutional boundaries.[3]

Faced with the task of determining whether or not the Tiburon city ordinance violated the Constitution, the United States Supreme Court turned its attention to the fifth amendment,[4] which is made applicable to state action by the fourteenth amendment.[5] The purpose of the fifth amendment is to prevent government from forcing an individual landowner to bear burdens "which in all fairness and justice, should be borne by the public as a whole."[6] By socializing the cost through compensation and distributing the individual's loss throughout the community, the property owner whose land has been taken for public benefit is thereby granted relief.[7] This is not to say that all zoning ordinances give rise to situations requiring compensation. The ordinance itself may provide for a socialization of the burden. Such is the case when the burden is evenly shared among all similarly situated owners and the "harmed" individuals substantially benefit from other aspects of the zoning.[8]

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3. *See generally* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (government's power to interfere with the rights of a landowner through zoning regulation is not unlimited); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

4. "No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

5. The fifth amendment's protection against the taking of private property for public use without just compensation has been incorporated by judicial interpretation into the due process clause of the fourteenth amendment. This means that the individual is protected from state action as well as federal. Chicago B. & O.R. Co. v. City of Chicago, 166 U.S. 226, 233 (1897). The California State Constitution provides additional protection and states in relevant part that "private property shall not be taken or damaged for public use without just compensation." CAL. CONST., art. I, § 19.

6. Armstrong v. United States, 364 U.S. 40, 49 (1960).

7. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 379 (1979) (Clark, J., dissenting) (citing Holtz v. Superior Court, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970)).

8. *See generally* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

Regardless of modern conditions, the meaning of the United States Constitution remains constant. "[T]he meaning of constitutional guaranties never varies, [but] the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."[9] At first glance the meaning of the constitutional guarantee that private property shall not be taken for public use without just compensation appears clear and unambiguous. However, realizing that government could no longer function if it had to pay a private owner every time any incidental property right was effected by a zoning ordinance,[10] the Supreme Court has engaged in that interpretive process called "application." While the Court cannot change the meaning of the Constitution, the Court can legitimately give constitutional guaranties an expanded or contracted[11] application.[12]

Those that argue for strict construction of the Constitution urge that the word "taken" means a physical appropriation, and that the original draftsmen never "conceived of the possibility that a regulation of the use of land could be considered a taking."[13] Professor Cormack has summarized the founding fathers' definition of a "taking" as "a purely physical conception."[14]

The greatest weight of authority, however, is not in favor of such a strict interpretation, which requires a physical taking in order to trigger fifth amendment protection.[15] "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional

9. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
10. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
11. 272 U.S. at 387.
12. It is sometimes difficult to tell where application ends and redefinition begins. Justice Black has noted, "[The Court] proceeds on the premise that a majority of this Court can change the Constitution day by day, month by month, and year by year, according to shifting notions of what is fair, reasonable and right. . . ." Rogers v. Bellei, 401 U.S. 815, 844 (1971).
13. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 238 (1973) [hereinafter cited as BOSSELMAN].
14. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 225 (1931).
15. "[W]e do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123 n.25 (1978).

sense, to the extent of damages suffered."[16]

Many state legislatures feared that the term "taken" would be given strict interpretation. In response to the inequities which might result from such a narrow judicial interpretation, a large number of state constitutions, including California's, further provide that property shall not be *damaged* without just compensation.[17]

According to the weight of authority, activation of fifth amendment guarantees is not limited to instances where there has been an actual appropriation.[18] "Property" does not stand for the tangible aspect of land alone. In its legal definition, "property" encompasses a bundle of rights inherent in the owner's relation to the physical land. These rights include possession, use, and disposition.[19] After announcing this broad definition, the Court proceeded to say that constitutional provisions are "addressed to every sort of interest the citizen may possess."[20] Use, therefore, which a zoning ordinance seeks to regulate, is an attribute of land ownership worthy of constitutional protection.[21]

II. THE FACTUAL SETTING

The appellants purchased five acres of unimproved residentially zoned property located in Tiburon, California, a small city on the northern edge of San Francisco Bay,[22] for the purpose of residential development. After the purchase, the City of Tiburon was required by state law to prepare and adopt general land use and open space plans.[23]

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16. 1 J. SACKMAN, NICHOLS, THE LAW OF EMINENT DOMAIN § 6.3 (3d ed. rev. 1980).

17. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1462-63, (1978); *see also* Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 866-67 (1973).

18. United States v. Kansas City Life Ins. Co., 339 U.S. 799, 804-08 (1950) (taking of agricultural use is considered a taking within the meaning of the fifth amendment); Nectow v. City of Cambridge, 277 U.S. 183, 123 n.25 (1928) (a taking can occur even where government has transferred no physical control over a portion of land); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414.

19. United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

20. *Id.* at 378.

21. *See* United States v. Causby, 328 U.S. 256 (1946) (the flight of government aircraft over Causby's land so interfered with the use of the property for a chicken farm that it worked a taking of an easement); Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (intense air pollution so deprived the landowner of use and enjoyment of his property that the pollution was held to effectuate a taking).

22. Tiburon is actually a peninsula surrounded by navigable waters on three sides.

23. The state law required that:

[T]he plan shall include the following elements:

In early 1972, Tiburon enlisted the services of Dean Witter & Co., Inc. to help the city prepare a financing plan for the acquisition of open space lands. Specifically identifying the Agins' land as suitable for open space acquisition, the Witter plan suggested that Tiburon issue city bonds in order to pay for open space acquisitions. Tiburon followed the advice and used a part of the bond proceeds to purchase a parcel of property adjoining the Agins' land.

Effective June 28, 1973, Tiburon enacted two zoning ordinances[24] which modified existing requirements. Under the new ordinances, the Agins' property was designated as "Residential Planned Development and Open Space Zone," meaning that the land could be used only for one-family dwellings, accessory buildings, and open space uses.[25] The new zoning further provided that not more than one dwelling per acre could be constructed.

Tiburon then filed an action in eminent domain against the Agins to purchase their five acres for open space on December 4, 1973. Almost a year later, in November 1974, the city filed notice that it was abandoning the eminent domain action. It was not until May 1975, that the eminent domain action was officially dismissed.

Before submitting a master plan[26] for the development of their

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(a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, openspace . . . and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan.

. . . .

(e) An openspace element as provided in Article 10.5 (commencing with Section 65560) of this chapter.

CAL. GOV'T CODE § 65302(a)(e) (West Supp. 1980).

24. TIBURON, CAL., ORDINANCE 123 N.S., 124 N.S. (1973).

25. The Tiburon zoning ordinance defines "Open Space Use" as the use of the land for "public recreation, enjoyment of scenic beauty, conservation of man and his artifacts, and containment and structuring of urban development." TIBURON, CAL., ORDINANCE 123 N.S., § 10-4 (1973).

26. Perhaps the appellants chose to file the action before preparing and submitting a master plan, due to the economic waste which would be involved in preparing a development plan which they knew would not meet zoning requirements. The new zoning ordinance required that prior to any grading or improvement, an owner must submit to the city a master plan together with the required fee. TIBURON, CAL., ORDINANCE 123 N.S., § 10-4 (G) (1973). The ordinance requires the master plan and text to be prepared by qualified practitioners in city planning, urban design, architecture, landscape, and engineering. *Id.* at (G)(1)(a). The ordinance further provides that a master plan shall include, among other

land, the Agins brought suit against the City of Tiburon seeking damages[27] for inverse condemnation and a declaration that the zoning ordinances were facially unconstitutional. They claimed that the ordinances were confiscatory[28] because the property had lost all its economic use and value for any of the three uses permitted by the ordinance. Appellants further claimed that the new zoning had prevented any sale, transfer, use, or development of any part of their property.

Tiburon demurred to the complaint, claiming that it failed to state a cause of action. The Superior Court sustained the city's demurrer and the California Supreme Court affirmed, holding: a landowner questioning the validity of a zoning ordinance may not sue for inverse condemnation, but is limited to the remedies of mandamus and declaratory relief; and that the zoning ordinance in question did not deprive appellants of their property without just compensation in violation of the fifth amendment.[29] The appellants then brought the matter before the United States Supreme Court, which addressed only the taking question and affirmed the California court's decision, "holding that the ordinance on its face does not take the appellants' property without just compensation."[30]

III. JUDICIAL SETTING

Although *Agins* had been preceeded by a long line of zoning and taking cases, there was no predetermined formula which the Court was bound to follow.[31] The Supreme Court "has been un-

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requirements, a general site plan showing existing and proposed locations and uses of all structures and areas; lot design; circulation systems; preliminary grading, drainage, landscaping, and elevations; a statement of concepts indicating how the development "satisfies relevant human needs for open space, view, and variety"; a proposal for dedication and/or for improvement; and maintenance of open space, circulation ways, view easements, and public recreation areas. *Id.* at (G)(1)(b).

27. The appellants claimed damages in the amount of $2,000,000, based on the fair market value of the five acres, plus the deprivation and loss of use to the date of the commencement of their action against Tiburon.

28. Providing for the permanence of open space, the ordinance in question sets forth the following requirement: "Land to be preserved as open space shall be maintained as permanent open space by dedication to the city of fee title or of scenic easement by deed restriction. . . ." TIBURON, CAL., ORDINANCE 123 N.S., § 10-4(E) (1973).

29. 24 Cal. 3d at 269, 277, 598 P.2d at 26, 31, 157 Cal. Rptr. at 373, 378.

30. Since the Court found no taking, it did not reach the question of "whether a state may limit the remedies available to a person whose land has been taken without just compensation." 100 S. Ct. at 2143.

31. The Court has set forth a four-part test in deciding what constitutes a compensable taking. The four components of the test are legitimate state interest, substantial relationship, economic impact on landowner, and balancing private loss against public gain. Each of these components is employed in the *Agins* deci-

able to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[32] There are, however, six basic themes of precedential value running throughout decisional law on the taking issue.

The first of these common themes is the Court's reliance on the facts particular to each case. In taking cases the Court prefers a case by case determination, observing that whether or not government action should be rendered a taking "depends largely upon the particular circumstances [in that] case."[33]

Beginning in 1922, with *Pennsylvania Coal Co. v. Mahon*,[34] the

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sion. The first two components resemble the considerations involved in the traditional rational basis test which is used as the standard of review where economic interests are concerned. Rational basis requires that the private interest shall be denied to promote a legitimate state purpose by means of an act reasonably necessary to achieve that legitimate purpose. While the first consideration of rational basis and the first component in the taking test are identical, where the relationship element is concerned, the taking test imposes the stricter requirement of substantial relationship. 272 U.S. at 395. "Such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*; Nectow v. City of Cambridge, 277 U.S. 183 (1928) "Such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188. In *Agins*, the Court cites *Nectow* stating that zoning effects a taking if it does not substantially advance legitimate state interests. 100 S. Ct. at 2141. The Court also cites the *Euclid* requirement for a substantial relationship to further a legitimate state interest. Finally, the Court found that the challenged ordinance in *Agins* "substantially advances legitimate governmental goals." *Id.*

The application of the rational basis test to cases where compensation is sought is a mere formality if a taking is not found. In other words, the Court's first matter of business is to determine whether or not a taking requiring compensation has occurred by use of the four-part taking test. If the Court finds a taking, then the fifth amendment offers the required solution of just compensation. However, if the Court finds no taking, then the challenged action is labeled as regulation which need only meet the rational basis standard of review. Since the action must have already met the requirement of legitimate state purpose and the stricter requirement of substantial relationship under the taking test, a formal reapplication of rational basis is unnecessary.

32. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

33. Penn Central Transp. Co. v. New York City, 438 U.S. at 124, concerned a landmark preservation law which designated plaintiffs' property as a historic landmark and prevented plaintiffs from constructing a multistory office building above the historic building. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958), involved a temporary order from the War Protection Board calling for the cessation of all nonessential gold mines to conserve equipment and manpower for war uses.

34. 260 U.S. 393 (1922).

Court recognized that the question of when an action reaches a magnitude equal to a taking depends upon the particular facts.[35] Then, in *United States v. Central Eureka Mining Co.*,[36] the Court noted that the traditional approach for determining a taking issue turns upon the particular circumstances of each case.[37] Even in recent taking cases,[38] the Court has recognized the need to engage in factual inquiry. In *Penn Central Transportation v. New York City*, the Court said that in assessing the particular circumstances of each case, it must engage in certain factual inquiries.[39] The Court in *Kaiser Aetna v. United States*,[40] made the same determination.[41]

The second recurring theme is that government regulatory action must advance a legitimate state purpose. A legitimate state interest is one that tends to promote the health, safety, morals, or general welfare of the public.[42] Throughout the decisions in various zoning cases, the Court has recognized a wide variety of interests as legitimate. In *Penn Central*, the Court held that an ordinance aimed at the preservation of a historic landmark reflected a legitimate state interest.[43] The Court has also found that a zoning ordinance providing for the segregation of residential, business, and industrial buildings is in the interest of public safety.[44] Indeed, the Court in *Village of Belle Terre v. Borass*,[45] went so far to say that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."[46]

The Court has given legitimate state interest a broad interpretation in zoning cases. Perhaps this is due to its lenient treatment of legitimate state interests in other cases where government regulation has been challenged. After a long line of cases striking down various governmental economic regulations[47] on the basis

35. *Id.* at 413.
36. 357 U.S. 155 (1958).
37. *Id.* at 168.
38. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Kaiser Aetna v. United States, 444 U.S. 164 (1979).
39. 438 U.S. 104, 124 (1978).
40. 444 U.S. 164 (1979).
41. *Id.* at 175.
42. *See generally*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); *see also* Nectow v. City of Cambridge, 277 U.S. 183 (1928).
43. 438 U.S. at 129.
44. 272 U.S. at 394, 395.
45. 416 U.S. 1 (1974).
46. *Id.* at 9.
47. Williams v. Standard Oil Co., 278 U.S. 235 (1929) (the Court invalidated a state statute which provided for the fixing of gasoline prices); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (the Court held invalid an act of Congress prescribing minimum wages for women and children in the District of Columbia); Lochner v.

that the questioned regulations did not reflect the promotion of a legitimate state interest, the Court turned to recognizing legitimacy by judicial notice.[48] In *Olsen v. Nebraska*,[49] the Court stated, "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left . . . to the states and to Congress.' "[50]

Closely related to the second theme of legitimate state interest is a third theme concerning the degree of relationship which the regulatory action must bear to legitimate concerns.[51] In order to be held constitutionally valid, a zoning ordinance must bear a substantial relationship and be a reasonable means of achieving the legitimate concerns of public health, safety, morals, or general welfare.[52]

Fourth, even though a regulation satisfies due process by promoting a legitimate state interest, there can still be a taking which requires compensation. An ordinance can be a perfectly valid exercise of regulation while still exacting a taking of private land requiring compensation.[53] The case of *Berman v. Parker*[54] is illustrative. In that case the Court held that the District of Columbia Redevelopment Act of 1945 was constitutional in that it

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New York, 198 U.S. 45 (1905) (the Court held unconstitutional a New York labor law restricting the number of hours which bakers could work); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (the Court held unconstitutional a Louisiana law making it a misdemeanor for Louisiana residents to enter a contract with a New York insurance company not licensed to do business in Louisiana); Chicago, M. & St. P.R. Co. v. Minnesota, 134 U.S. 418 (1890) (the Court held unconstitutional a Minnesota statute authorizing a state commission to fix rates to be charged by railroads).

48. *See generally* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

49. 313 U.S. 236 (1941).

50. *Id.*

51. Nectow v. City of Cambridge, 277 U.S. at 188 (1928); Village of Euclid, 272 U.S. at 395.

52. 272 U.S. at 188. The Court found that a zoning ordinance violated the fourteenth amendment because it did not bear a substantial relationship to public health, safety, morals, or general welfare; reaching this decision even though it found the ordinance in its general scope to be constitutional. In addition to the reasonable or substantial relationship test, for land use regulations there is an added balancing test. This test holds that the value of a regulation to the public must be balanced against the loss of the individual landowner. BOSSELMAN *supra* note 13 at 238.

53. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1462 (1978). "Although a given measure may be reasonably related to health, safety, morals or general welfare of society, it may still violate the 'taking clause' of the fifth amendment. . . ." *Id.*

54. 348 U.S. 26 (1954).

was instituted by Congress for the legitimate public purpose of eliminating slums and substandard housing conditions.[55] Regardless of how legitimate and noble its purpose, the Act called for the taking of private property and the rights of the effected property owners could only be satisfied "when they receive[d] the just compensation which the Fifth Amendment exacts as the price of the taking."[56]

A further illustration concerning this fourth theme is the case of *Hurley v. Kincaid*.[57] In *Hurley*, the Court reversed a lower court's decision which granted injunctive relief as to enforcement of an ordinance and instead gave the landowner monetary relief in inverse condemnation. The ordinance pursued legitimate public objectives but was flawed in that it failed to compensate the landowner. Rather than strike down the ordinance and circumvent genuine governmental concern for public welfare, the Court ordered just compensation.[58]

Until the California Supreme Court's decision in *Agins v. City of Tiburon*,[59] the California rule held that a zoning law, which was a valid exercise of police power, could nevertheless constitute a taking requiring compensation.[60] The mere existence of a governmental entity's power of eminent domain is evidence that while property is taken for legitimate public uses, the private land owner must still be compensated for his loss.

The question of what constitutes a taking leads to the fifth common theme indicating that no physical invasion or appropriation is required in order to find a taking.[61] The Court has recognized the inappropriateness of a physical invasion test in a modern society where "intrusions of a non-physical nature are the rule rather than the exception."[62] In *Penn Central Transp. Co. v. New*

55. *Id.* at 28. Congress had made a legislative determination that eliminating substandard living conditions was necessary to promote public health, safety, morals, and general welfare.

56. *Id.* at 36.

57. 285 U.S. 95 (1932).

58. *Id.* at 104.

59. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

60. *See* Eldridge v. City of Palo Alto, 57 Cal. App. 3d. 613, 129 Cal. Rptr. 575 (1976). The original appellate opinion appeared at 124 Cal. Rptr. 547 (1975), but was omitted from the official reporter because the California Supreme Court granted a hearing on *Eldridge* and remanded the case for reconsideration in view of its decision in HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975). However, on remand the court of appeal reaffirmed its view that an excessively restrictive zoning ordinance can constitute a taking and support an action for damages. Willemsen and Phillips, *Down-Zoning and Exclusionary Zoning in California Law*, 31 HASTINGS L. J. 103, 105 (1979) (citing Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 633, 129 Cal. Rptr. 575, 578 (1976)).

61. *See* notes 18, 21 *supra* and accompanying text.

62. *See Developments in the Law—Zoning*, *supra* note 53, at 1468.

York City, the Court stated that "we do not embrace the proposition that a 'taking' can never occur unless government has transfered physical control over a portion of a parcel."[63]

Finally, to complete the judicial setting, the sixth recurring theme attempts to define a taking, using the economic or diminution in value test. "The diminution in value test holds that where state regulation causes too great a decrease in the market value of a property holding, that regulation constitutes a taking compensable under the Fifth Amendment."[64]

The diminution in value test was first expressed by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[65] Holmes stated that when diminution in value reaches a certain magnitude, compensation must be required[66] and that "mak[ing] it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[67] Although the decision in *Pennsylvania Coal* has been the object of much criticism,[68] the United States Supreme Court continues to cite it as authoritative.[69]

In *Penn Central*[70] and again in *Kaiser Aetna v. United States*,[71] the Court identified two factors having particular significance in determining when compensation is necessary: the economic impact of the regulation upon the claimant and the extent to which the regulation interferes with distinct and reasonable investment-backed expectations. These factors are not necessarily determinative, but they do aid the Court in deciding whether compensation should be awarded.

An examination of these themes reveals a four-part test utilized by the *Agins* Court. The four components are: the legitimacy of state purpose, substantial relationship to that purpose, economic

63. 438 U.S. at 123 n.25.
64. *Developments in the Law—Zoning*, *supra* note 53, at 1476-77.
65. 260 U.S. 393 (1922).
66. *Id.* at 413.
67. *Id.* at 414.
68. The decision in *Pennsylvania Coal* has been widely criticized by various authors. *See* BOSSELMAN, *supra* note 13, at 124-40, 238, 240; Costonis, *"Fair" Compensation and the Accommodation Power*, in REGULATION V. COMPENSATION IN LAND USE CONTROL 3 (1977); Berger, *A Reply . . .*, in REGULATION V. COMPENSATION IN LAND USE CONTROL 67, 68 (1977).
69. *See generally Penn Central*, 438 U.S. 104 (1978); Kaiser Aetna v. United States, 444 U.S. 164 (1979).
70. 438 U.S. 104 (1978).
71. 444 U.S. at 175.

impact upon the landowner, and a balancing of private loss against public gain. The first three components are themes in their own right, while the balancing component considers how the interrelationship of all six themes produces a final result.

IV. Evaluation of the Court's Decision Against Constitutional, Factual, and Judicial Backdrops

Although the constitutional, factual, and judicial settings have been independently discussed in the previous sections of this casenote, there is a necessary overlapping of each, which sets a single stage for the United States Supreme Court's decision in *Agins v. City of Tiburon*. This analysis begins with a delineation of those facts and issues properly before the Court.

The Supreme Court has repeatedly recognized the importance of deciding cases, like *Agins*, on the circumstances and facts particular to each case. In *Agins*, the substantive facts before the Court consisted of those facts appearing in the complaint[72] and the two questioned California zoning ordinances.[73]

At the initial proceeding in *Agins*, Tiburon's demurrer had the effect of conceeding all averments of fact in the complaint to be true. The appellants alleged that "the natural and proximate result of said Ordinance has been to prevent any sale, use, transfer or development . . . [and] has resulted in the taking of Plaintiffs' property . . . without due process of law and without any compensation."[74]

While California courts are prevented on demurrer from finding facts contrary to those well pleaded in the complaint,[75] they may go outside the pleadings and consider matters that may be judicially noticed under the California Evidence Code.[76] In *Agins*, the California Supreme Court took such judicial notice by comparing the allegations to the express terms of the ordinance. Since the words of the ordinance allowed the construction of between one and five dwellings, the California Supreme Court rejected as a matter of law[77] the appellants' "contention that the

72. Since the Superior Court sustained the demurrer and the California Supreme Court affirmed, there was never a trial on the merits in which facts additional to those in the complaint could be introduced as evidence.

73. 100 S. Ct. at 2141.

74. Complaint for Appellants at 7, Agins v. City of Tiburon, 100 S. Ct. 2138 (1980).

75. *See* Serrano v. Priest, 5 Cal. 3d 584, 591, 487 P.2d 1241, 1245, 96 Cal. Rptr. 601, 605 (1971).

76. A state court may take judicial notice of a municipal ordinance. Cal. Evid. Code § 452(b) (West 1966).

77. 100 S. Ct. at 2141 n.6. "Under California practice, allegations in a complaint are taken to be true unless 'contrary to law or to a fact of which a court may take

ordinance prevented all use of the land."[78] The United States Supreme Court chose not to disturb the state court's action on this point.[79] Therefore, as *Agins* stood before the Court, not only was there no record of a trial on the merits for the Court to consider, but also, in a case standing on its pleadings alone, the important allegation that all use had been denied was barred from the Court's consideration.

Noting that the appellants had not submitted a development plan[80] to the city as the ordinances permitted, the Court concluded that there was "no concrete controversy regarding the application of the specific zoning provisions."[81] This observation could not lead to a refusal to hear the case altogether, because the Court had previously held in *Village of Euclid v. Ambler Realty Co.*,[82] that where equitable relief is sought there is no need for a plaintiff to first submit a plan to the city for approval when the effect of the complaint is an attack on the ordinance as whole.[83] *Euclid* held that the mere existence and maintenance of an unconstitutional zoning ordinance constitutes a present invasion of property rights.[84] Thus, the Court stated that in *Agins* the only question properly before it was "whether mere enactment of the zoning ordinance constitute[d] a taking."[85] In so framing the question for determination, the Court actually addressed itself only to the Agins' claim for declaratory relief and left untouched their claim for monetary relief by inverse condemnation.[86]

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judicial notice.' " Dale v. City of Mountain View, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976). California courts may take judicial notice of municipal ordinances. CAL. EVID. CODE § 452(b) (West 1966).

78. 100 S. Ct. at 2141 n.6.

79. *Id.* "The appellants' objection to the state supreme court's application of state law does not raise a federal question appropriate for review by this court." *Id.*

80. *See* note 26 *supra* for the requirements of such a plan.

81. 100 S. Ct. at 2141.

82. 272 U.S. 365 (1926).

83. *Id.* at 386.

84. *Village of Euclid*, 272 U.S. at 386.

85. 100 S. Ct. at 2141.

86. "A 'declaratory judgment' is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law without ordering anything to be done. . . ." 26 C.J.S. *Declaratory Judgment* § 1 (1956).

> The essential distinction between a 'declaratory judgment action' and the usual 'action' is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, although there must be no uncertainty that the loss will occur or that the asserted right will be invaded.

The Court's basic approach focused on the mere enactment and therefore examined only the words of the ordinance and not its true effect on the appellants. Yet here, the "economic or physical reality may contradict" the purported uses granted by the words of the ordinance.[87] Additionally, a focus on words alone, without regard to their impact on constitutionally protected rights, is unlikely to yield a proper result and is contradictory of the Court's established record of factual inquiry in taking cases.[88]

Although the Court said no concrete controversy existed as to the application of the specific zoning provisions because no development plan had been filed, it began its analysis of the question in *Agins* with a statement concerning the *application* of a general zoning law.[89] Thus, the Court realized that examination of the facial quality of even a general zoning law must be accomplished through scrutinizing its application to a particular property and, therefore, its effect upon a particular plaintiff. In spite of this acknowledgement, the Court proceeded to treat the facts relating to effect only abstractly. It merely recited the words of the ordinance and drew the conclusion that the ordinance had no substantially harmful effect upon the appellants.[90]

After defining the only issue as whether mere enactment of the ordinance constituted a taking, the Court applied each component of the four-part taking test. Beginning with the first component, the Court was quick to find that the zoning ordinances advanced a legitimate state purpose.[91] The Court recognized the intent of the California legislature and the Tiburon City Council to protect society from the "ill effects of urbanization" as a legitimate governmental goal.[92] For all practical purposes, this finding of legitimacy was almost automatic.[93]

Id. Therefore, although no plan had been filed, the Agins' request for declaratory relief was certainly proper and not premature.

87. Appellants' Brief at 10, Agins v. City of Tiburon, 100 S. Ct. at 2138.

88. *See* notes 33-41 *supra* and accompanying text.

89. 100 S. Ct. at 2141.

90. As Professor Van Alystyne puts it, "With some exceptions the decisional law is largely characterized by confusing and incompatible results, often explained in *conclusionary terminology*, circular reasoning, and empty rhetoric [often accompanied] by the frequently reiterated judicial declaration that each case must be decided on its own facts." Van Alystyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1 (1970) (emphasis added).

91. *See* notes 42-46 *supra* and accompanying text.

92. 100 S. Ct. at 2141-42 (citing Cal. Gov't Code § 65561(b)).

93. In Berman v. Parker, 348 U.S. 26 (1954), the Court stated that "once the public purpose is established, the amount and character of the land to be taken . . . rests in the discretion of the legislature." *Id.* at 35-36. Since legislative discretion and intent seem to play such an important part in the Court's own determination of what types of purposes are legitimate and also in the amount and character

Even when the legitimacy of state interest is fully recognized, the zoning ordinance must bear a substantial relationship to the legitimate interest.[94] The Court reiterated the substantial relationship component as part of its *Agins* decision, finding that the challenged Tiburon ordinance "substantially advances legitimate governmental goals," because "it insures careful and orderly development."[95]

In addition, the *Agins* Court also employed the balancing component.[96] The Court's choice of a balancing test which weighed the public gain resulting from the regulation against the property owner's individual loss is certainly appropriate, as it goes to the very purpose of the fifth amendment.[97] Weighing the interests, the Court found that the appellants would actually benefit from the zoning ordinances because the ordinances serve "the city's interest in assuring careful and orderly development of residential property with provision for open-space areas."[98] Thus, the Court decided the balancing test in favor of the city.

The Court's calculation that there was no economic burden imposed upon appellants is open to the charge of speculation for two reasons. First, there was no trial record from which to draw evidence in ascertaining economic impact. Secondly, the appellants' allegation that all value had been destroyed was incorrectly disregarded by the Court through its acceptance of the state

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of the land to be taken, perhaps the Court would have done well to notice the legislature's intent where the manner of the taking was concerned. Sections 6950 to 6954 of the California Government Code specifically authorize the acquisition of private property for open space through the exercise of eminent domain of which compensation is an important element. CAL. GOV'T CODE §§ 6950-6954; Appellants' Brief at 5, Agins v. City of Tiburon, 100 S. Ct. 2138. Further still, § 65912 of the California Government Code declares that it is not the intent of the open space article to authorize adoption of open space zoning which will "take or damage private property for public use without payment of just compensation." CAL. GOV'T CODE § 65912 (West Supp. 1980). Justice Clark referred to this section in his dissent to the California Supreme Court's decision in *Agins*.

94. *See* Nectow v. City of Cambridge, 277 U.S. at 188; Village of Euclid v. Ambler Realty Co., 272 U.S. at 395.

95. 100 S. Ct. at 2141.

96. *Id.* at 2142. Some commentators object to the use of the balancing test for compensation issues because as long as public benefit is great enough, private property values may be completely destroyed without remedy. *See* Haley, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process of Taking Without Just Compensation*, 54 WASH. L. REV. 315, 333-34 (1979).

97. *See* note 17 *supra* and accompanying text.

98. 100 S. Ct. at 2142. How the appellants can benefit when they are not even residents of Tiburon and the only effect of the ordinance on them has been to decrease their property's value is difficult to imagine.

court's denial of appellants' allegation that the ordinance had prevented all use.[99]

Facts are of particular importance "when the legal issue is as diffuse as the balancing test."[100] "The absence of clear theoretical guidelines makes the facts become more important than the law. What goes into the balance is more important than the process of balancing."[101] As is readily ascertainable, the Court put words from the ordinance on one side of the scale and pure speculation as to these words' effect on the other.[102] What seems to be needed in order to tip the balance in favor of a private owner is total loss of value by physical destruction, as was the case in *Berman v. Parker*.[103]

Even if a state interest is found legitimate, the state can still be required to compensate the plaintiff.[104] In addition to judicial precedent, the Constitution does not find legitimate state interest and required compensation to be mutually exclusive of the other. Rather, "the Fifth Amendment presupposes that [property] is wanted for public use, but provides that it shall not be taken for such use without compensation."[105]

Agins v. City of Tiburon presented both a due process and compensation claim.[106] Therefore, once due process had been satisfied[107] by finding a legitimate state interest, the analysis needed to move away from a focus on the quality of the action and to the quantity of the action. For the compensation issue the major emphasis must shift to the degree of the taking. In *Agins*, the Court properly made such a transition by addressing itself to the aspect of the economic impact component of the taking test. While recognizing the judicially settled "economic viability" standard[108] or diminution in value test,[109] the Court's treatment of the economic impact in *Agins* is equally as disappointing as its balancing methods. According to its decisions in *Penn Central* and *Kaiser Aetna*, deciding questions of economic impact should be the result of *fac-*

99. *See* notes 77-79 and 115-18 *supra* and accompanying text.
100. BOSSELMAN, *supra* note 13, at 284.
101. *Id.* at 293.
102. See note 127 *infra*.
103. 348 U.S. 26 (1954). *See also* notes 55 and 56 *supra* and accompanying text.
104. *See* notes 53-58 *supra* and accompanying text.
105. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
106. Complaint for Appellants at 7, Agins v. City of Tiburon, 100 S. Ct. at 2138.
107. The central idea of substantive due process as it relates to zoning regulation, is that all individuals must relinquish some property rights for public good, but only when the governmental action passes specific minimal standards. Haley, *supra* note 96, at 321. These minimal standards are that the law must not be "unnecessary, unreasonable, irrational, arbitrary, or capricious." *Id.* at 320.
108. 100 S. Ct. at 2141.
109. *See* notes 64-67 *supra* and accompanying text.

tual inquiry.[110] In assessing the economic impact on the Agins, the Court found that "the appellants *may* be permitted to build as many as five houses on their five acres. . . ."[111] On this basis alone the Court concluded that "the appellants are free to pursue their reasonable investment expectation by submitting a development plan to local officials."[112]

Where the established judicial standard is factual inquiry,[113] the Court's examination of economic impact was highly speculative. Lacking the relevant facts on which to base such a decision, the Court declared that a density of one single-family dwelling per acre is likely to yield a reasonable investment.[114]

Although the appellants did not specifically allege their inability to realize a reasonable investment, they did allege that under the ordinance the value of their property was completely destroyed.[115] This particular allegation was before the Court as an uncontroverted fact[116] on appeal. Although the state supreme court had rejected the allegation that the ordinance prevented all

110. Penn. Central Transp. Co. v. New York City, 438 U.S. at 124; Kaiser Aetna v. United States, 444 U.S. at 175.

111. 100 S. Ct. at 2142 (emphasis added).

112. *Id.* TIBURON, CAL., ORDINANCE 123 N.S. § 10-4 (G)(1)(a) and (b). As far as being in a position to pursue one's reasonable investment by plan submission, how can the Court reasonably expect a landowner, who has challenged the ordinance on the basis that it is no longer economically feasible to develop the property, to then spend a great sum of money in having a master plan drawn up and submitted which may subsequently be rejected for failure to meet vague requirements such as "relevant human needs for openspace, views, variety, harmony within the development and the surrounding areas, and clarity of organization"? TIBURON, CAL., ORDINANCE 123 N.S. § 10-4(G)(1)(b)(3) (1973), *see* note 26 *supra* for a discussion of expenses involved in the submission of such plans.

113. *See Penn Central*, 438 U.S. at 124; *Kaiser Aetna*, 444 U.S. at 175.

114. Particular facts and even expert testimony is especially important in land use cases. BOSSELMAN, *supra* note 13, at 293. When considering investment return, there are two cost factors to be considered. The first is land cost. The Agins' basis or cost of the property would have remained the same regardless of how many units they were permitted to build. However, the second factor, improvement costs, is the crucial consideration in determining investment return. Improvement costs include such items as planning and engineering, soils and geology, permits and fees, streets, sewers, and storm drains. When improvement costs are divided by five homes instead of 10 or 20, the result may very well be that the owner will not be able to get a reasonable return on his investment. Further, all reasonable use of the property may be denied in that this result affects marketability.

115. Complaint for Appellants at 7, Agins v. City of Tiburon, 100 S. Ct. 2138.

116. *See* note 75 and accompanying text. Evidently the Supreme Court took the same course of action with regard to value as the California court had taken on use. The California court took judicial notice that all use had not been denied. The Supreme Court took this finding one step farther by deciding that since *all*

development,[117] it did not reject the allegation of a decrease in value.[118]

In *Penn Central*, the Court emphasized that its holding that a landmark preservation law had not taken the appellants' property was based on the appellants' "present ability to use the [property] in a gainful fashion."[119] However, in *Agins*, the Court looked only to a speculative future ability to use the land gainfully under the ordinance.

Concluding its economic analysis, the Court stated that "it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."[120] The validity of this statement as to actual impact and effect, when facts had been given at best—superficial treatment, is questionable considering the stage set by constitutional and judicial principles.

This analysis has offered a look at the methods employed by the *Agins* Court, with any negative criticism directed not at the final determination of "no taking," but rather at the Court's departure from the established precendent of deciding takings cases on the facts and circumstances particular to each case.[121] However, the facts and circumstances of *Agins* may very well have compelled the departure. The Court may have felt it could avoid the greatest amount of speculation by reaching a "no taking" result. While this determination definitely required the use of speculation, an opposite decision would perhaps have required more.

Due to the demurrer by the City of Tiburon at the trial stage, all facts consisted only of those in the complaint and the two ordinances of which the California court took judicial notice.[122] In dealing with the facts concerning economic harm, the Supreme Court evidently dismissed the Agins' allegation of loss of all value of the property when it acknowledged the California court's dis-

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use had not been denied, the rezoned property remained valuable. *See* note 117 *supra* and accompanying text.

117. Agins v. City of Tiburon, 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378. "According to the wording of the ordinance, of which we may take note, the RPD-1 zoning allows plaintiffs to build between one and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented." *Id.* Implicit in the plaintiffs' claim was the argument that the ordinance prevented all *profitable* development.

118. *Id.* The California court did recognize a decrease in the value of the property but labeled such decrease as permissible.

119. *Penn Central*, 438 U.S. at 138 n.36. The Court in this case noted that the city had conceded that if in the future appellants could demonstrate that the permitted use had ceased to be "economically viable," appellants could obtain relief. However, the Agins do not have the benefit of such a concession.

120. 100 S. Ct. at 2142.

121. *See* notes 33-41 *supra* and accompanying text.

122. *See* notes 72-73 *supra* and accompanying text.

missal of the averment of loss of all use.[123] The Court was therefore left with no facts indicating the degree of economic harm. Feeling comfortable with the likelihood that at least some value must have remained, the Court declared that appellants were free to pursue their reasonable investment by plan submission.[124] Thus, the Court apparently set the standard that no economic loss will be recognized where the opportunity for plan submission yet remains.[125] In a further attempt to avoid speculation, the Court took additional advantage of the circumstance that no plan had been filed. The Court shifted its emphasis away from application of specific provisions of the ordinance and focused on the mere enactment.[126] By defining their emphasis as "mere enactment," it seems the Court felt it did not have to seriously consider the ordinances' effect upon the appellants.[127] It could therefore

123. *See* note 116 *supra* and accompanying text.

124. 100 S. Ct. at 2142.

125. In keeping with the state court's finding that "a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use," Agins v. City of Tiburon, 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378, the Supreme Court's new standard of economic loss seems to suggest that all value must be denied before a taking requiring compensation will be found.

126. 100 S. Ct. at 2141.

127. The Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) also refused to deal with specific provisions of the ordinance. In *Euclid*, as in *Agins*, the constitutionality of a zoning ordinance was challenged prior to any attempt on the part of the complainant to obtain a building permit. 272 U.S. at 386. The *Euclid* Court refused to decide the impact of the provisions of the ordinance upon those questioning its validity. In refusing to so decide, the Court said it had no basis other than speculation for such a determination. 272 U.S. at 397. The Court said,

> What would be the effect of a restraint imposed by one of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters.

Id. Therefore, the *Euclid* Court chose only to determine that the general scope of the ordinance was constitutionally valid. Due to the claim presented, the *Euclid* Court could forego consideration of the effect of the provisions, because *Euclid* involved a fourteenth amendment due process claim. "[T]he minimal requirement of substantive due process, focuses on the taking . . . where no compensation is required and asks whether the government has acted properly." Haley, *supra* note 96, at 325-26. The ordinance in *Euclid* was held constitutional as a "valid exercise of authority. . . ." 272 U.S. at 397. Therefore, there was no need for the Court to examine the effect of various provisions in order to reach a decision on the claim presented.

The *Agins* Court was not afforded the luxury of legitimately overlooking the provisions and their effect. *Agins* presented a fifth amendment taking without com-

avoid outright speculation and draw a conclusion that no substantial harm occurred without appearing negligent.

V. CONCLUSION

As a concrete indication of the United State Supreme Court's present attitude on zoning and fifth amendment takings, *Agins v. City of Tiburon* represents only the Court's continued reluctance to take such a meaningful stand. Perhaps the *Agins* Court's reluctance was a product of unspoken policy considerations. If the Court had found a taking, it would have been left to make one of two choices, either to invalidate the ordinance, or to require the payment of just compensation. To require payment could have meant severe adverse economic consequences for the City of Tiburon. To invalidate the ordinance would have left coastal land unprotected or paved the way for a subsequent ordinance only slightly less restrictive.[128] Additionally, if the Court found a taking, it would have had to actively deal with the issue of whether inverse condemnation should be available as a remedy for aggrieved property owners, a decision which many Californians eagerly awaited.

In determining whether a compensable taking has occurred, *Agins* infers that diligent factual inquiry is no longer the standard. Furthermore, *Agins* sets the precedent that as long as a zoning ordinance allows some use and makes provision for the pursuit of one's reasonable investment expectation by allowing plan submission for the regulating authority's approval, no economic loss in value will be recognized.[129] Finally, *Agins* leaves an aggrieved landowner without the previously available remedy of inverse condemnation, limiting him to the remedies of declaratory relief and mandamus.

Agins is particularly important in view of the current concern for the protection of the environment. The result of such concern inevitably means the enactment of more zoning restrictions. With

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pensation claim. A compensation analysis "considers whether the government has taken more from an individual than he should fairly be expected to give up without compensation." Haley, *supra* note 96, at 326. Necessarily, the *Agins* Court "had" to consider the ordinance's provisions in order to determine how much, if anything, had been taken.

128. *See* Willemsen and Phillips, *supra* note 60, at 116.

129. To hold that economic harm cannot be established where a complainant has not yet filed a plan seems clearly unreasonable. It would be unreasonable to require economic waste through the expenditure of substantial funds to have a plan drawn which does not conform to zoning requirements merely to show damage. Such a requirement might even be prejudicial in that it would bar the small landowner from challenging an ordinance due to his inability to commit economic waste.

the trend seeming to be the elevation of environmentalism over recognition of constitutionally protected rights, the legislatures, if not the courts, need to put matters back in proper prospective. There is no reason why protection of the environment and protection of constitutional rights cannot peacefully co-exist. Although traditional alternatives may not strike the balance, there are alternatives that can.[130]

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130. *See* Krasnowiecki and Strong, *Compensable Regulations for Open Space: A Means of Controlling Urban Growth*, in NO LAND IS AN ISLAND 141 (1975). The authors present the alternative of paying compensation, not when the regulation is imposed, but only when the owner sells at a loss on the open market. *Id.* at 143. Under their proposal, the regulating entity guarantees the fair market value of the property just prior to regulation. If upon the sale of such property on the open market the amount realized is less than the amount guaranteed, the regulating entity must pay the difference. *Id.* at 153. *See also* Costonis, *"Fair" Compensation and the Accommodation Power*, in REGULATION V. COMPENSATION IN LAND USE CONTROL 3 (1977). Costonis believes that there is a "deadlock" in the present treatment of taking cases because such treatment cannot accommodate both the government and private landowners. He feels that a third power, the "accommodation" power, must be introduced "to fill the void that currently divides the police and eminent domain powers." *Id.* at 4. *See also* Berger, *supra* note 68. In summarizing Costonis's accommodation theory, Berger makes the following observations. The accommodation theory is activated when an owner is denied "reasonable use." There is no need for the regulation to be nullified or for traditional compensation. Instead, the accommodation power provides the following options: (1) a variance that would allow reasonable beneficial use; (2) payment in dollars for the difference between the land's value for reasonable beneficial use and its controlled value; or (3) a fair compensation in a non-dollar manner such as tax benefits or the issuance of transferable development rights. *Id.* at 68.